

NORANDA EXPLORATION, INC.

IBLA 82-896

Decided February 10, 1983

Appeal from decision of the New Mexico State Office, Bureau of Land Management, readjusting potassium leases. NM 26309 and NM 013298-C.

Reversed and remanded.

1. Mineral Leasing Act: Generally -- Potassium Leases and Permits:
Leases

Where a potassium lease issued under the provisions of sec. 3 of the Act of Feb. 7, 1927, as amended, 30 U.S.C. § 283 (1976), provides that the Secretary may readjust and fix the royalties payable thereunder, and other terms and conditions, at the end of 20 years from the date of issuance of the lease and thereafter at the end of each succeeding 20-year period during the continuance of the lease, notice to the lessee of readjustment in the royalties and other terms and conditions must be made when the 20-year period expires and not at some later time.

APPEARANCES: Ray R. Regan, Esq., Santa Fe, New Mexico, for appellant; John H. Harrington, Esq., Office of the Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Noranda Exploration, Inc. (Noranda), appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated May 17, 1982, readjusting certain potassium leases designated therein. The leases at issue and their dates of issuance are as follows:

NM 26309	February 24, 1953
NM 013298-C	February 24, 1953

Each of these leases was issued pursuant to the terms and provisions of the Act of February 7, 1927, 30 U.S.C. §§ 281-287 (1976), which provides in

relevant part: "Any lease issued under sections 281 to 287 of this title shall be for a term of twenty years and so long thereafter as the lessee complies with the terms and conditions of the lease and upon further condition that at the end of each twenty-year period succeeding the date of the lease such reasonable adjustment of the terms and conditions thereof may be made therein as may be prescribed by the Secretary of the Interior unless otherwise provided by law at the expiration of such periods." 30 U.S.C. § 283 (1976).

During the initial 20-year period of each of the leases, no notice of BLM's intention to readjust the terms or conditions of the leases was directed by BLM to appellant or appellant's predecessor in interest. By decision of May 17, 1982, BLM informed appellant that the subject leases had completed their 20-year terms on February 24, 1973. Lease forms containing new provisions with respect to minimum production were enclosed with BLM's decision; regulation 43 CFR 3522.2-1 was cited by BLM as support for this decision. This regulation reads:

Potassium and phosphate. The terms and conditions of potassium and phosphate leases are subject to readjustment at the end of each 20-year period succeeding the effective date of the lease unless otherwise provided by law at the time of the expiration of such periods. Before the expiration of each 20-year period, whenever feasible, the lessee will be notified of the proposed readjustment of terms or notified that no readjustment is to be made. Within 30 days after receipt of the notice, unless the lessee files his objection to the proposed readjusted terms, or the lessee files a relinquishment of the lease, he will be deemed to have agreed to such readjusted terms.

A regulation similar to the above appeared at 19 FR 9190 (Dec. 24, 1954) and was codified at 43 CFR 194.21. During the initial 20-year term of the leases, this regulation was altered and redesignated. See, e.g., 43 CFR 3143.4 (1964); 43 CFR 3522.2-1 (1970); and 43 CFR 3522.2-1 (1976).

The leases at issue also reserved to the Government "[t]he right reasonably to adjust and fix royalties * * * at the end of 20 years from * * * date hereof."

The gist of appellant's argument on appeal is the contention that BLM may not now readjust the subject leases and require Noranda to pay increased minimum royalty payments after having failed to readjust the leases at the end of their 20-year term. Appellant calls the Board's attention to sections 2(c) and 2(d) of the new leases. Section 2(c) provides that the lessee will pay rent, beginning January 1, 1983, in an amount equal to \$1 per acre per year. Section 2(d) requires minimum annual production or the payment of a minimum royalty of \$2 per acre per year. A careful reading of the original leases reveals that the lessee has been obligated to pay rent in the amount of \$1 per acre per year since the sixth year of the leases. Appellant is incorrect in citing section 2(c) as an example of a readjusted lease provision. Appellant is correct, however, in citing section 2(d) as such, because the original lease required minimum annual production or the payment of a

minimum royalty of \$1 per acre. This increase of \$1 to \$2 per acre per year is consistent with a change in the Department's regulations. See 43 CFR 3503.3-2(b)(2) (45 FR 36035 (May 28, 1980)).

The issue whether BLM may readjust lease terms after the end of the 20-year term of a lease was recently decided by the Court of Appeals in Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949 (10th Cir. 1982), in the context of coal leases. The court in Rosebud concluded that the end of the 20-year term of the lease marked the deadline for readjusting the terms of the lease and that, in the absence of notice of a proposed readjustment, BLM was thereafter precluded from readjusting the terms of the lease. Specifically, the court stated:

The time for readjustment of coal terms comes so infrequently that it must be assumed that timely consideration is given in the ordinary administrative process. If no action is taken by the Government for an extended time it is reasonable to assume that a decision was made not to take advantage of the opportunity provided by the Mineral Leasing Act. Thus a continuation of the old royalty rate and other lease provisions can be considered a choice then made by the administrators. When such a choice was made we find no provisions in the Act nor in the regulations permitting the Department to reverse the position it took originally at the prescribed time.

Rosebud Coal Sales Co. v. Andrus, supra at 952. The court concluded that BLM's attempt to readjust the terms of the lease after the end of the 20-year term without notice prior to the end of the 20-year term was contrary to both the statute and the terms of the lease. ^{1/} The decision in Rosebud is applicable to potassium leases because similar statutory, regulatory, and lease provisions are involved. Noranda Exploration, Inc., 69 IBLA 317 (1982); International Minerals and Chemical Corp., 69 IBLA 114, 116 (1982).

The Solicitor's representative argues that appellant had timely notice, or is charged with timely notice, that its leases would be readjusted (Response at 3). However, the argument that appellant was on notice of BLM's intentions to readjust by virtue of correspondence in 1970 between counsel for the potash industry and the New Mexico State Director is unconvincing. In the absence of notice to appellant prior to the end of the 20-year term of each lease, BLM's decision readjusting the terms and conditions of these leases is contrary to Rosebud.

^{1/} We note that the holding of the court pertained to readjustments of the lease terms after the close of a 20-year period where notice of intent to make adjustment was not given prior to the end of the period. We are bound by this holding. It must be recognized, however, that the court did not foreclose readjustment after the end of a 20-year term where notice of a proposed readjustment is given prior to the end of the 20-year term. See Rosebud Coal Sales Co. v. Andrus, supra at 953; Kaiser Steel Corp., 63 IBLA 363, 367 (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the cases are remanded. 2/

Anne Poindexter Lewis
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

2/ Our holding herein makes unnecessary any response to appellant's motion to dismiss and order redress, filed with this Board on Feb. 23, 1982.

